12-3-2013

State v. Ehrlick Appellant's Reply Brief Dckt. 39249

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39249
	)	
v.	)	ADA COUNTY NO. CR 2009-15268
	)	
DANIEL EDWARD EHRLICK, JR.,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Daniel Ehrlick appeals from his judgment of conviction entered upon a jury finding him guilty of first degree murder and failure to report a death to law enforcement. He asserts that in light of the numerous erroneous evidentiary rulings, the prejudicial nature of the evidence erroneously admitted, the misconduct committed by the prosecutor, and the highly circumstantial nature of the evidence against him, the errors either individually or cumulative deprived him of his right to a fair trial and this Court must vacate his convictions. This Reply Brief is necessary to address the State's assertions to the contrary.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ehrlick's Appellant's Brief and need not be repeated in detail in this Reply Brief, but are incorporated herein by reference thereto. The State makes numerous factually incorrect statements in its Respondent's Brief and these misstatements will be clarified and corrected, as necessary, within the section for which these facts are relevant.

ISSUES

1. Did the District Court abuse its discretion by allowing FBI Agent Martin to testify that eye witnesses who saw R.M. alive and well on July 24, 2009, were not credible?

2. Did the district court err in admitting State's Exhibit 26-A, a model of R.M.'s head, as the exhibit was not relevant, could not assist the jury, and was overly prejudicial?

3. Did the district court err by admitting highly prejudicial Rule 404(b) evidence that was not relevant to any issue other than propensity?

4. Did the district court abuse its discretion when it granted the State's Second Motion in Limine regarding the presentation of evidence of Mr. Ehrlick's alleged attempt to alter and/or influence the testimony of Ms. Jenkins?

5. Did the district court err in granting the State's Fifth Motion in Limine regarding the presentation of evidence of Mr. Ehrlick's emergency room visit on July 31, 2009?

6. Did the district court abuse its discretion by allowing Samantha Burnett to testify that others told her that they had not heard of a birthday party and that, in her lay opinion, the story of R.M. going to a birthday party did not make sense to her?

7. Did the district court abuse its discretion when it denied Mr. Ehrlick's request to question Detective Brechweld as to whether K.D. told him that there was talk of a birthday party on July 24th as the statement was not offered for the truth of the matter asserted; rather, the statement was offered to rebut the State's theory that Mr. Ehrlick and Ms. Jenkins made up the birthday party story?

8. Did the district court err in allowing the State to question Mr. Ehrlick regarding a custody agreement for R.A. and in allowing the custody agreement to be admitted as an exhibit although it was later withdrawn by the district court as improperly admitted?

9. Did the State violate Mr. Ehrlick's right to a fair trial by committing prosecutorial misconduct?

10. Even if the above errors are individually harmless, was Mr. Ehrlick's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?[1]

[1] Mr. Ehrlick will not be providing a response to the issue of cumulative error because the State's argument on this issue is unremarkable.

ARGUMENT

I.

The District Court Abused Its Discretion By Allowing FBI Agent Martin To Testify That Eye Witnesses Who Saw R.M. Alive And Well On July 24, 2009, Were Not Credible

A. Introduction

Mr. Ehrlick asserts that the district court erred by allowing FBI Agent Mary Martin to testify that she believed eye witnesses who saw R.M. alive and well on July 24, 2009, were not credible. Mr. Ehrlick's arguments in support of this claim are contained in the Appellant's Brief and need not be repeated herein in detail. (*See* Appellant's Brief, pp.15-21.) In response, the State offers a new justification for Agent Martin's testimony, i.e., to establish the thoroughness of the investigation, and the State further argues, under the incorrect standard of review, that any error was harmless. (Respondent's Brief, pp.5-13.) For the reasons stated below, the State's arguments are without merit.

B. Defense Counsel's Opening Statement Did Not Make The Thoroughness Of The Police Investigation A Fact Of Consequence

"Whether a fact is 'of consequence' or material is determined by its relationship to the legal theories presented by the parties." *State v. Shackelford*, 150 Idaho 355, 364 (2010) (citing *State v. Yakovac,* 145 Idaho 437, 444 (2008)). The State asserts that the thoroughness of the police investigation was a fact of consequence based upon defense counsel's purportedly arguing to the jury that law enforcement's focus on Mr. Ehrlick and Ms. Jenkins "skewed their investigation." (Respondent's Brief, p.8 (citing Tr., p.1316, Ls.9-23; p.1318, Ls.1-10 (portions of defense counsel's opening statements).) The State appears to imply that Agent Martin's testimony was somehow necessary to rebut a legal theory proffered by the defense that the investigation was not thorough. The State misrepresents the record.

Defense counsel did not imply that the lack of a thorough investigation was a defense; rather, defense counsel simply reminded the jurors that, regardless of how thorough the investigation was, it was for them to decide what occurred and, who was credible. During its opening statement, the prosecutor raised the specter of its investigation arguing,

> Ladies and gentlemen, that 911 call set off what became the largest missing child investigation in this part of the State. Not only did Boise City Police Department throw the entirety of all available resources they could spare into finding [R.M.], but teams of the top investigators and detectives from every local agency: From Garden City, Meridian City, Ada County sheriff's office, the State police, probation and parole, the FBI and national missing children experts all poured into Boise with 2.000 members of this community who all were trying to do one thing, and that was find [R.M.].

(Tr., p.1266, Ls.8-19.) The prosecutor then spoke of the commencement of the criminal investigation including officers questioning Mr. Ehrlick, "six days after the investigation began," and four days prior to R.M.'s body being discovered. (Tr., p.1266, L.20 – p.1269, L.10.) The prosecutor repeatedly referred to law enforcement's interactions with Mr. Ehrlick, including statements he made during the investigation, and claimed "the State maintains that Danny Ehrlick admitted to everything that you need to know that he did this." (Tr., p.1284, L.4 – p.1292, L.23.)

In its opening, defense counsel stated on multiple occasions that it was jury's duty, not law enforcement's, to decide what occurred and who was credible. (Tr., p.1314, Ls.15-16 ("And again, you're going to get information that will help you make that decision. You will be able to decide ..."); p.1315, Ls.17-19 ("It's not relevant what the police officers think. What's relevant is what you think. And don't let them substitute their judgment for your judgment"); p.1316, Ls.5-8 ("And so again, it will be your decision as to who you believe and what you believe and ultimately to make a decision on what happened to this boy. But more importantly, who did it.").) Counsel argued,

> The procedure of a trial, you already know this but I just remind you, that the State gets to go first. It's the power of the government, again. As you evaluate this testimony, it is fair for you to understand that the government did bring to bear a great deal of resources, at least initially, ostensibly to recover and find the boy but, ultimately, to accuse and convict. And it's fair for you to evaluate that marshalling of effort. **I ask you to do that in the sense that you get to make the decision, they don't.** And again, we are hopeful that you will hear all this and you'll understand, with this onslaught of behaviors by the police and activities, that puts in context some of the things you hear.

(Tr., p.1317, L.22 – p.318, L.10. (emphasis added.) The defense did not posit a legal theory that the State's investigation was "skewed" or otherwise inadequate as the State now claims; rather, defense counsel argued that regardless of the thoroughness of the investigation, it was the jury's duty to determine what transpired and who was credible, not law enforcement's or the prosecutor's. (Tr., p.1317, L.22, - p.1318, L.10.) The State's assertion that defense counsel opened the door for the admission of Agent Martin's testimony about the credibility of witnesses, by correctly informing the jurors that it was their job, not law enforcement's job, to make decisions about the credibility of witnesses, is absurd.

C. Agent Martin's Testimony Was Offered By The State Specifically To Discredit Eye Witness Accounts Of R.M. Being Seen Alive And Well On July 24, 2009

The State asserts that "Agent Martin's testimony was not offered to show the credibility of any witness or potential witness but to show the police response and thoroughness of the investigation of potential leads." (Respondent's Brief, p.9.) The State's proffered justification is factually erroneous.

Prior to asking the specific questions that drew the objections asserted as erroneously overruled on this appeal, the prosecutor asked Agent Martin what her "ultimately conclusion" was regarding R.M. being seen in multiple places on the 24th, and this question drew a hearsay objection from the defense. (Tr. P.4442, L.14 – p.4443, L.8.) The State argued, "it's not offered for the truth; it's more offered to show that all of these different sightings can't be credible, can't

be believed, so for the falsity of the statements and not the truth of anything." (Tr., p.4443, Ls.19-23.) When the defense argued that Agent Martin's conclusions are irrelevant and that it is not proper for her to offer an opinion as to whether people were telling the truth, the State responded by asserting,

> On the hearsay argument, hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. We're not trying to prove the truth of the matter asserted by any of these statements.
>
> **Frankly, it's been the state's position from the beginning that [R.M.] was never outside on the 24th.** Regardless, this witness talked to a number of different people, and I think she could testify that given all the information that she had received, [R.M.] couldn't possibly have been in all of those places. I don't see how that's hearsay.

(Tr., p.4443, L.24 – p.4445, L.11. (emphasis added).) Contrary to the State's appellate theory, the prosecutor acknowledged that the very purpose of soliciting Agent Martin's testimony was to show the jury that there were no credible sightings of R.M. on July 24, 2009.

Additionally, the prosecutor did not stop by merely asking Agent Martin about who she interviewed and how many reports she read; rather, the prosecutor specifically solicited Agent Martin's opinion on the credibility of those who informed law enforcement that they saw R.M. alive and well on that day. (Tr., p.4454, Ls.18-20 ("And based upon your investigation – were you able to determine whether or not that was a credible lead or a credible last sighting?"); p.4456, L.25 – p.4457, L.2 ("And did you determine whether or not either of them provided a credible last sighting of [R.M.]?"); p.4457, L.25 – p.4458, L.2 ("And were you able to find what you believed were any credible sightings of [R.M.] there at the pool?").) When referring to Agent Martin's testimony during closing arguments, the prosecutor did not argue her testimony counters any perceived claim about a lack of a thorough investigation; instead, the prosecutor argued they Agent Martin's investigation proved there were no credible sightings of R.M. on the

day he was reported missing:

> There was no credible sighting of that child outside on July 24th.
>
> You heard Mary Martin with the FBI. You heard from Detective Rawson. They followed up on lead after lead after lead after lead, and their sole purpose was to find a credible sighting of [R.M.] outside on the 24th, and they didn't find a single one.

(Tr., p.6295, Ls.18-25.) The State's assertion that Agent Martin's testimony was offered to show the thoroughness of the police investigation is factually erroneous.

D. Agent Martin's Opinion About The Credibility Of Eye Witnesses Was Not Relevant To Any Purported Challenge To The Thoroughness Of The Police Investigation

Assuming the thoroughness of the police investigation in this case was somehow a fact of consequence for the jury to decide, Agent Martin's opinion about the credibility of eye witnesses who saw R.M. alive and well on July 24, 2009, is simply not relevant to the jury's consideration of this issue. The prosecutor did, in fact, ask Agent Martin (and numerous other witnesses) what she did to assist in this investigation. (Tr., p.4434, L.4 – p.4441, L.19.) Her testimony that she reviewed reports and witness statements and interviewed witnesses herself demonstrated the thoroughness of her investigation. (Tr., p.4439, L.3 – p.4440, L.11.) Her conclusions that witnesses were not credible did not assist the jury in determining whether or not they thought she did a good job.

E. The State's Argument, If Accepted By This Court, Would Effectively Overrule *Almaraz* and *Perry* And Create A Special Rule Allowing Law Enforcement Personnel To Opine On The Credibility Of Witnesses

In *State v. Almaraz*, 154 Idaho 584, 301 P.3d 242 (2013), an opinion which became final less than four months prior to the State filing its Respondent's Brief in this case,[2] this Court stated, "Expert testimony that only vouches for the credibility of another witness 'encroaches

[2] The State's Petition for Rehearing in *Almaraz* was denied on May 31, 2013, while the State filed its Respondent's Brief in this case on September 6, 2013.

upon the jury's vital and exclusive function to make credibility determinations, and therefore does not "assist the trier of fact" as required by Rule 702.'" *Id.*, 154 Idaho at ___, 301 P.3d at 257 (quoting *State v. Perry,* 139 Idaho 520, 525 (2003).) The *Almaraz* Court recognized,

> Expert testimony that only vouches for the credibility of another witness "**encroaches upon the jury's vital and exclusive function to make credibility determinations**, and therefore does not 'assist the trier of fact' as required by Rule 702." *State v. Perry,* 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003). However, expert opinion testimony that is admissible under I.R.E. 702 "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." I.R.E. 704. Indeed, we have routinely held that "an expert's opinion, in a proper case, is admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses or the weight of disputed evidence. **To venture beyond that point, however, is to usurp the jury's function**." *Perry,* 139 Idaho at 525, 81 P.3d at 1235 (quoting *State v. Hester,* 114 Idaho 688, 696, 760 P.2d 27, 35 (1988)).

Id., 154 Idaho at ___, 301 P.3d at 257-258. (emphasis added). The State attempts to get around this clear holding by emphasizing the word "only," suggesting that the *Almaraz* opinion does not preclude expert testimony that vouches for the credibility of another witness provided another justification could also be given for the vouching. (Respondent's Brief, pp.7-10.) This Court should reject this suggestion.

If police officers, sheriff's deputies, or federal agents are allowed to testify that a witness was either credible or not credible in order to explain what they did next in their investigation, the fundamental principle that *Almaraz* and *Perry* are based upon - the vital and exclusive role of the jury in making credibility determinations - would be rendered meaningless. The State suggests that this Court adopt an exception that would swallow the rule. A police officer would *always* be allowed to render an opinion on the credibility of a witness whenever the credibility of that witness was at issue, provided that credibility determination was made in the course of the officer's investigation. There is simply no legal justification for allowing an officer to testify that, based upon her training and experience, the complaining witness was telling the truth and the

suspect was lying, and therefore she completed her investigation by arresting the defendant.

However, if this Court were to adopt the State's reasoning such a rule would necessarily also apply to defense investigators. A State may not apply a rule of evidence that permits a witness to take a stand, but arbitrarily excludes material portions of his or her testimony. *Rock v. Arkansas*, 483 U.S. 44, 54 (1987). If this Court adopts the reasoning underpinning the State's argument – that a witness may opine on the credibility of another witness provided doing so is a material part of his or her "investigation" – defense investigators necessarily would be able to provide their own opinion as to the credibility of witnesses, less the Court adopt a rule that would arbitrarily exclude this "material" testimony. It would arguably constitute ineffective assistance of counsel for a defense counsel *not* to hire an investigator to investigate an alleged sexual assault on a child, for example, in order to provide testimony that, in the investigator's opinion, the child is not credible. Jurors should determine the credibility of all witnesses, not just the credibility of purported expert witnesses called upon to opine about the credibility of other witnesses. This Court should reject the State's suggestion that this Court adopt a rule that would effectively overrule *Almaraz* and *Perry*.

F. The State Has Failed To Assert, Much Less Demonstrate, That The Error In Admitting Agent Martin's Testimony Was Harmless Beyond A Reasonable Doubt

The State has failed to meet either its burden of production or persuasion demonstrating beyond a reasonable doubt, that Agent Martin's testimony did not contribute to the guilty verdict.

1. The State Is Required To Prove, Beyond A Reasonable Doubt, That Agent Martin's Testimony Did Not Contribute To The Guilty Verdict, Not That A Guilty Verdict Would Have Been Rendered Had The Jury Not Heard Agent Martin's Testimony

Initially, the State claims, "'The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged

evidence.'" (Respondent's Brief, p.10 (quoting *State v. Johnson*, 148 Idaho 664, 669 (2010)) (in turn citing *Chapman v. California*, 386 U.S. 18, 24 (1967); *Neder v. United States*, 527 U.S. 1, 18 (1999)).) The suggestion is that this Court should consider whether the jury would have found Mr. Ehrlick guilty had they not heard Agent Martin's testimony. While the State quotes the *Johnson* opinion accurately, the legal premise quoted is simply wrong.

This Court has recognized,

> Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, *unless* the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

(*Almaraz*, 154 Idaho 584 ___, 301 P.3d 242, 256 (2013) (citing *State v. Perry,* 150 Idaho 209, 221 (2010) (in turn quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)).) Indeed, the United States Supreme Court has held,

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993) (citing *Rose v. Clark,* 478 U.S. 570, 578 (1986); *Clark*, 478 U.S at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois,* 481 U.S. 497, 509–510 (1987) (STEVENS, J., dissenting).) Notably, in reversing the defendant's conviction, the *Almaraz* Court noted, "the State never specifically argues that [improperly admitted testimony] did not 'contribute to the verdict obtained' as clearly required under *Perry*." *Almaraz* 154 Idaho at ___, 301 P.3d 242, 256. Thus, it is not enough for the State to assert the jury would have convicted Mr. Ehrlick if the district court correctly kept Agent Martin's opinion testimony on eyewitness identifications out. The State must first assert, and then prove beyond a

reasonable doubt, that Agent Martin's testimony did not contribute to the guilty verdict actually attained.

2. The State Has Failed To Assert A Claim That Agent Martin's Opinion That M.R. And Jennifer Hastings Were Not Credible Was Harmless; Therefore, This Court Must Vacate Mr. Ehrlick's Convictions

The State erroneously claims that Agent Martin provided her inadmissible opinion testimony *only* as it related to O.J.'s credibility. (Respondent's Brief, p.11.) Agent Martin's opinion testimony was not so limited.

Agent Martin testified that her role was to create a "research timeline" to determine the last time R.M. was seen, and she did so by conducting her own interviews and reviewing "all the reports" to try and find the last "credible sighting." (Tr., p.4434, L.4 – p.4440, L.24.) Agent Martin testified that she investigated reports of other people who said they saw R.M. in the pool area on the 24th and, again over defense counsel's objection that her opinion invades the province of the jury, and that "The jury is the sole judge of credibility here, not this witness," the district court allowed Agent Martin to testify that she did not find any sightings that she believed to be credible. (Tr., p.4457, L.8 – p.4458, L.14.) Agent Martin testified that, "There were **several reports** that [R.M.] had been at the pool and in the hot tub that day with other children," and over defense counsel's "asked and answered" objection, Agent Martin testified that she was **not able to find a last credible sighting** of R.M. (Tr., p.4459, L.15 – p.4460, L.16 (emphasis added).)

In addition to O.J., M.R. who was 17 at the time R.M. went missing, testified that she was visiting her friend C.G., and the two of them took C.G.'s younger siblings to the pool around 6:30 p.m. (Tr., p.5679, L.21 – p.5686, L.18.) M.R. testified that she saw R.M., whom she had seen before at the complex and knew by name, near the pool area playing with C.G.'s youngest

siblings and K.D. later in the evening (Tr., p.5686, L.19 – p.5692, L.8.) M.R. testified that she has been interviewed by Agent Martin and others several times, and that she told Agent Martin the same information that she testified to and that she is positive she saw R.M. (Tr., p.5693, Ls.9-23.) Additionally, Jennifer Hastings, another neighbor who had taken her kids down to the pool on July 24th, testified that she was shown a picture of R.M. on the night of the 24th by an officer and that she told the officer that she had, in fact, seen R.M. in the pool area. (Tr., p.5739, L.7 – p.5751, L.1.)

The State's claim that Agent Martin only opined as to O.J.'s credibility is simply false. She testified that her very purpose in the investigation was to review all of the reports and she did so. She testified, over defense objection, that she found no credible sightings. M.R. and Jennifer Hastings each testified that they saw R.M. alive and well in the pool area on July 24th and gave this information to police – M.R. testified that she specifically spoke with Agent Martin. The State has affirmatively forfeited its opportunity to argue that Agent Martin's opinion regarding the credibility M.R. and Ms. Hastings' testimony, believing that Agent Martin did not do so. (Respondent's Brief, p.11, fn.1.)[3] As such, if this Court finds error, this Court must vacate Mr. Ehrlick's convictions. (*See Almaraz*, 154 Idaho at ___, 301 P.3d at 256-257.)

3. The State Failed To Argue, Much Less Demonstrate Beyond A Reasonable Doubt, That Agent Martin's Testimony That She Found O.J. Not To Be Credible Did Not Contribute To The Verdict Obtained

Based upon its claim that the evidence against Mr. Ehrlick was "very strong," the State argues, "this court can conclude beyond a reasonable doubt both that the jury would have concluded there were no credible sightings of R.M. alive the afternoon he died and would have

[3] To the extent that the State is asserting that an expert *may* opine as to the credibility of witness so long as the expert does not mention that person by name, the State does so with neither argument nor authority. (*See* Respondent's Brief, p.11, fn.1) Furthermore, if a party can get around *Almaraz* and *Perry* by having an expert testify that the a witness is not credible, but not name the particular witness, a party's ability to present a witness that

found Ehrlick guilty had the challenged testimony by Agent Martin not been admitted." (Respondent's Brief, p.12.) The State's entire harmless error argument is based upon a non-existent standard of review. The State has failed to acknowledge, let alone address, the question of whether Agent Martin's testimony *contributed* the verdict.

The State argues, "[n]or was Agent Martin's testimony that she concluded the last sighting reported by O.J. was not credible and therefore abandoned as a lead **ultimately unfairly prejudicial** to [Mr.] Ehrlick because the jury had ample opportunity to review O.J.'s many inconsistent statements and make its own credibility determinations." (Respondent's Brief, p.11 (emphasis added).) Again, this is simply not the correct test. The State must prove, beyond a reasonable doubt, the error *did not contribute to the verdict*, not that the evidence was "unfairly" prejudicial. *See Almaraz*, 154 Idaho 584 ___, 301 P.3d 242, 256-257 (2013). Furthermore, the State has tacitly acknowledged that the evidence *was* prejudicial (though in its opinion not "unfairly" so) and, thus, has tacitly acknowledged that it cannot meet its actual burden of demonstrating the evidence did not contribute to the verdict

Furthermore, the State argues, "[t]here is no reason to believe in this case that the jury simply deferred to the agent rather than made its own credibility determination." *Id.* Again, this is simply not the correct test. The jury need not completely "defer" to Agent Martin's credibility determination in order for the testimony to be harmful (and, thus, not harmless). Jurors need only consider this testimony in weighing their own credibility determination. If jurors, when considering whether or not O.J. saw R.M. alive and well on July 24th, considered Agent Martin's opinion, by definition, Agent Martin's testimony *contributed* to their own credibility determination and, under the facts of this case, *contributed* to the verdict. As argued in the

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would invade the province of the jury, will be entirely dependent upon the attorney's ability to refrain from asking the expert the name of the witness they are opining about.

Appellant's Brief (*see* Appellant's Brief, pp.17-21), and not challenged in the Respondent's Brief (*see* Respondent's Brief, pp.10-13), Agent Martin's credibility determination did not go to a collateral subject – it went to the heart of both the prosecution and defense cases. The State must prove that Agent Martin's testimony did not contribute to the verdict – they do not meet this burden by suggesting, without any supporting evidence, that the jury may not have deferred to her opinion.

Finally, the State's argument that evidence showed R.M. ate oatmeal less than 5 hours before his death (and thus, Mr. Ehrlick must have killed him)[4] (Respondent's Brief, p.12), in addition to being totally irrelevant to the proper harmless error analysis, is another tacit acknowledgement that the error in this case is *not* harmless. The State's argument is founded upon the unremarkable idea that jurors often times believe expert testimony. The State supports its claim by citing to transcripts bearing the testimony of Dr. Cass Smith, a pediatric gastroenterologist, and Dr. Michael Sexton, a child-abuse pediatrician, who both opined as to how long it would take a child such as R.M. to digest oatmeal and raisins. (Respondent's Brief, p.12; *see also* Tr., p.1912, L.7 – p.2015, L.3.) The State's argument necessarily depends upon the premise that jurors would necessarily accept this testimony as fact. However, the State provides no explanation as to why jurors in this case would believe the expert opinions of Drs. Smith and Sexton, but would not even consider Agent Martin's expert opinion when making their own credibility determinations. There is simply no reason to believe, and the State has not offered a reason to consider, that the testimony of Drs. Smith and Sexton contributed to the verdict, but Agent Smith's testimony did not.

[4] The State never actually established a time of death. *See generally*, Tr.

The State has failed to adequately raise, properly analyze, and sufficiently prove, that the district court's erroneous decision to allow Agent Martin to opine on the credibility of eyewitnesses is harmless beyond a reasonable doubt.

II.

The District Court Erred In Admitting State's Exhibit 26-A, A Model Of R.M.'s Head, As The Exhibit Was Not Relevant, Could Not Assist The Jury, And Was Overly Prejudicial

A. Introduction

Mr. Ehrlick asserts that it was error for the district court to allow the admittance of a model of R.M.'s head because the model was inaccurate and, as such, could not assist the jury either by illustrating the size of the contusion in comparison to R.M.'s head or in comparing R.M.'s head to a hole in the wall, the purposes for which it was admitted. Mr. Ehrlick also asserts that, without expert testimony to assist the jury in a comparison between the model and the hole in the wall, the jury was not able to appropriately compare the two, rendering the exhibit inadmissible for the purpose of making such a comparison. In response, the State asserts that the model is "relevant to show the location and relative size of R.M.'s injuries and that [Mr.] Ehrlick could have inflicted those injuries by striking R.M.'s head against a wall in [Mr.] Ehrlick's apartment with sufficient force to cause a hole generally matching the size of R.M.'s head." (Respondent's Brief, p.13.) Reply is necessary to address these erroneous assertions.

B. The District Court Erred In Admitting State's Exhibit 26-A, A Model Of R.M.'s Head, As The Exhibit Was Not Relevant, Could Not Assist The Jury, And Was Overly Prejudicial

1. The Model Head Was Not Relevant; Therefore, It Was Not Admissible

The State has asserted that the model was relevant and that Mr. Ehrlick's appellate argument goes only to weight, citing to several cases in support of its claim. (Respondent's Brief, pp.14-16.) However, Mr. Ehrlick maintains that the model is not relevant as it did not

have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." I.R.E. 401.

The cases relied upon by the State to show that exhibits that are similar or not to scale can be admissible are not persuasive in the matter at hand. In *State v. Durst,* 126 Idaho 140 (1994), an anatomically correct doll was used to assist a mentally disabled woman in explaining to the jury what the defendant had done to her, "the dolls helped her explain those events and thus their use assisted the jury in understanding the victim's testimony." *Id.* at 142. In *Durst* accuracy of the exhibit was not at issue. *Id.* The exhibit was only used by the victim to explain her testimony, not admitted for the jury to make its own comparisons and it does not appear that the exhibit was admitted and provided to the jury. *Id.* As such, this case offers little guidance on whether the model of R.M.'s head was relevant in the case at hand, where accuracy is challenged and the model was admitted for the purposes of indentifying the size of an injury to the victim and comparing its size to another exhibit.

The State has also relied upon *State v. Stevens,* 146 Idaho 139 (2008). In *Stevens*, a video depicting four different objects falling down stairs was found to be relevant for the purpose of illustrating testimony regarding the principals involved in such a fall. *Id.* at 143-144. The jury was instructed that the video was "simply evidence used to illustrate Shaibani's testimony."[5] *Id.* at 143. In this case, the four items shown falling from the stairs did not simulate a human body. *Id.* Because *Stevens* did not involve a model offered to closely resemble the victim or a human in any way, and did not involve the direct action of the jury in comparing pieces of evidence, this case is also distinguishable and offers little, if any, applicable authority.

[5] Mr. Ehrlick notes that the limiting instruction given immediately after the introduction of the evidence was a critical point in the analysis of the prejudicial effect of the evidence. *Id.* at 144. There was no such limiting instruction provided in the case at hand.

Further, Mr. Ehrlick notes that in *Stevens* the jury was afforded expert testimony on whether or not a fall could have induced the victim's injuries, including specific expert testimony on the "principals involved" in how objects fall down stairs. *Id.* at 144. However, in the case at hand, no expert testimony was provided for the jury to assist in their comparison of the model and the hole in the wall. As such, this case supports Mr. Ehrlick's proposition that evidence like the model requires expert testimony to supply its relevance and assist the jury in understanding and adequately interpreting the evidence. Certainly if expert testimony is required to explain how objects fall down stairs, expert testimony is required to explain one object's impact upon another and the resulting damage.

In *State v. Glass*, 146 Idaho 77 (Ct.App 2008), the defendant asserted that the State had failed to adequately connect a screen name (used in enticing a child) to Mr. Glass. *Id.* at 82. The Idaho Court of Appeals found that there had been sufficient evidence to tie the screen name and, as such, the chat logs, to Mr. Glass and meet foundational requirements. *Id.* The Court went on to hold that the strength of the connection between Mr. Glass and the chat logs was to be considered by the jury in deciding whether or not Mr. Glass was the perpetrator, i.e. claims that evidence is insufficient to show the matter for which it is offered go to weight, not relevance. *Id.* This holding is not applicable to the case at hand.

The dispute in the case at hand is to the accuracy of the model and its ability to assist the jury. In Mr. Ehrlick's case, the model cannot assist the jury for its admitted purposes if it is not accurate. The jury in *Glass* was able to determine if the chat logs contained communications from Mr. Glass after being provided expert testimony on the uniqueness of chat names. *Id.* at 81. *Glass*'s holding could be persuasive if the model in Mr. Ehrlick's case was accurate and the jury was provided some expert testimony to assist them in making a determination as to what weight

to give a comparison between the model and the wall. However, because the model was inaccurate and the jury was not provided expert guidance, the jury was deprived its ability to adequately weigh the evidence and, therefore, *Glass* is not persuasive.

State v. Christopherson, 108 Idaho 502 (Ct.App 1985), was cited by the State in support of its arggument that "[c]laims that the evidence is not sufficient to show the matter for which it offered go to weight, not relevance" because the admission of knives of "similar description" to the knife used in the robbery 'was proper." (Respondent's Brief, p.15.) However, the entire discussion of this issue in *Christopherson* is as quoted as follows, "Finally, since the robber used a folding knife with a four-inch blade, the admission of defendant's knives of a similar description was proper. Even though subsequent cross-examination revealed that the knives were not the ones used, any possible prejudicial effect was effectively negated by the cross-examination." *Christopherson*, 108 at 505. Mr. Ehrlick asserts that this limited analysis, which primarily focused on the prejudicial effect, is not in anyway persuasive on the issue at hand.

The State then relied upon *State v. Rhodes*, 627 N.W.2d 74 (2001) and *State v. Shaw*, 839 S.W.2d 30 (1992), for the proposition that models of victims' heads are admissible unless the jury would be misled. In *Rhodes,* the model, which was "life-sized, realistic, bruise covered and generally grotesque," was used to show the locations of injuries and whether they could have been caused from intentional violence (location and distance of bruises was inconsistent with the defense theory) and was admitted "solely for illustrative purposes so Dr. McGee could explain the injuries from a three-dimensional perspective, and cautioned the jury about the model's limited function." *Rhodes*, 627 N.W.2d at 84. In *Shaw*, the model was a Styrofoam model of a head with a pencil inserted to show the location of the wound and angle taken by the bullet. *Shaw*, 839 S.W.2d at 35. The court specifically found that the jury could not have been mislead

by the evidence and that, to the contrary, the model aided the jury in understanding the expert's testimony about the path of the bullet. *Id.* Mr. Ehrlick asserts that these cases appear to be more on point with the use of the model by Dr. Groben for the purposes of illustrating where the contusion was located on the skull, an issue that was not raised by Mr. Ehrlick on appeal. Further, he asserts that these cases support his position that the model was not admissible for other purposes because, unlike the models in *Rhodes* and *Shaw*, the model of R.M.'s head could easily mislead the jury due to its inaccuracy.

The State maintains that the model head is relevant to show the "relative size" of R.M.'s head and in determining the mechanism of injury (does the model match the hole in the wall). (Respondent's Brief, p.15.) However, the model cannot show either of these things because of its inaccuracy. Despite the State's attempt to characterize the exhibit's erroneous measurements as "minor differences," and to misrepresent and underestimate the true extent of the discrepancies by stating that such an exhibit does not need to be "precise to the millimeter," the model head is decidedly inaccurate: 3.5 centimeters in the circumference and .7 centimeters in breadth. (Tr., p.2802, L.25 – p.2804, L.5.) The State also asserts that model was "accurate enough" to allow for certain comparisons. (Respondent's Brief, p.16.) Mr. Ehrlick maintains that this is simply not true especially in light of the State's argument that the model "matches up perfectly with the model of the hole in the wall," but is notably smaller that R.M.'s actual head. (Tr., p.1470, L.15, p.2931, Ls.10-11.)

The State has also asserted that this Court should not consider a hat sizing chart or infant head circumference chart mentioned in the Appellant's Brief. (Respondent's Brief, p16, n.2.) Mr. Ehrlick certainly agrees that these documents were not provided or argued to the district court. However, they need not be because they are only discussed to help highlight the extreme

inaccuracy of the model. The actual measurements which were applied to these charts were before the district court. Certainly no evidence was presented regarding measurements taken by a haberdasher or a pediatrician and the model was not presented to show hat size or percentile for head growth. These charts were used only to illustrate an example, not to definitively prove hat size, and to place the disparity in head size into proper perspective, much in the same way hypotheticals are routinely used to illustrate a point.[6] Further, the State has provided no authority in support of its proposition that they cannot be considered for this purpose.

2. Absent Expert Testimony, The Model Was Inadmissible As It Could Not Assist The Jury

The State appears to be arguing through its citation to *State v. Simmons*, 102 Idaho 672 (Ct.App. 1991) (addressing the admissibility of silver dollars which could not be positively identified) that Mr. Ehrlick has not proven that expert testimony was necessary to prove that the model head was a model of R.M.'s head. This is not the issue addressed on appeal. Instead, the issue is whether or not the jury should or could use the model head to evaluate how it fit into the wall without expert testimony on this issue. Mr. Ehrlick maintains that the model could not assist the jury in making this determination without the additional assistance of an expert and directs the Court attention to the argument presented on pages 29-31 of the Appellant's Brief. The State has failed to argue otherwise.

3. The Probative Value Is Outweighed By The Prejudicial Effect

The State's arguments on this issue are unremarkable and will not be addressed in this Brief.

[6] Mr. Ehrlick is aware that 3.5 centimeters and .7 centimeters may sound like minor discrepancies. However, they are substantial in this circumstance and these documents illustrate the significance; these measurements reflect a difference in head size from an infant/toddler under three years of age and an eight-year-old boy.

4. The State Failed To Assert, Much Less Demonstrate, That The Error In Admitting The Model Of R.M's Head Was Harmless Beyond A Reasonable Doubt

The State applied the improper harmless error standard, failing to present argument that the erroneously admitted model of R.M.'s did not contribute to the conviction. The State must show "beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Perry*, 150 Idaho 209, 227 (2010); *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). The State has merely argued that the there is "no reason to believe that the jury disregarded the evidence [regarding the accuracy of the model]." (Respondent's Brief, p.19.) The State has failed to argue, much less prove beyond a reasonable doubt, that the jury did not consider the model head for its asserted purposes and that such considerations did not contribute to the convictions. Therefore, the State has failed to meet its burden to show the error is harmless.

III.

The District Court Erred By Admitting Highly Prejudicial Rule 404(b) Evidence That Was Not Relevant To Any Issue Other Than Propensity

A. Introduction

Reply is necessary to address the State's assertion that the I.R.E. 404(b) evidence regarding the abuse of three of Mr. Ehrlick's former girlfriends is relevant to show intent. Mr. Ehrlick will also discuss the State's erroneous argument regarding harmless error. The State's arguments regarding weighing of the probative value versus the prejudicial effect were unremarkable and, therefore, will not be addressed in this Reply.

B. The District Court Erred By Admitting Highly Prejudicial Rule 404(b) Evidence That Was Not Relevant To Any Issue Other Than Propensity

The State asserts on appeal that the 404(b) evidence related to prior acts of violence was properly admitted for the purposes of showing intent, motive, and lack of mistake or accident. (Respondent's Brief, pp.21-24.) However, the State has only provided argument related to the purpose of intent. (Respondent's Brief, pp.21-24.) Because the State failed to present argument or authority in support of its position that the evidence was relevant for the purposes of showing motive and lack of mistake or accident, these arguments are not properly presented on appeal. *State v. Zichko*, 129 Idaho 259, 263 (1996).

1. The Evidence Was Not Relevant To Show Intent

The State appears to argue that the evidence involving the prior abuse of three ex-girlfriends is relevant and admissible either because Mr. Ehrlick admitted to physically disciplining R.M. or because the State has a duty to prove specific intent to torture. Neither of these asserted grounds allow the admission of this testimony for the purposes of showing intent, based upon the application of relevant case law.

As discussed in detail in the Appellant's Brief, the case law relied upon by the district court in allowing the admission of the prior bad acts evidence is easily distinguishable from the facts of the present case. (Appellant's Brief, pp.38-42.) Most notably, in *State v. Stuart*, 110 Idaho 163 (1986), *State v. Rodriguez*, 2005 WL 1785796 (Cal. App. 1 Dist), and *State v. Pierce*, 346 N.C. 471 (1997) the defendants had each admitted to committing the charged acts, but without either criminal intent or without an intent to torture. *Id.* As such, a reasonable interpretation of these cases is that such 404(b) evidence is only admissible when the defendant admits the charged criminal acts, but directly challenges his intent. *Id.* The State has provided no authority to rebut this reading of the relevant case law. (Respondent's Brief, pp.19-24.) While Mr. Ehrlick did admit some limited physical disciplining of R.M., he did not admit to

committing the crimes charged, inflicting injuries similar to the fatal injuries, or inflicting the fatal injuries to R.M. As such, the case at hand is easily distinguishable from the relevant case law which would allow similar 404(b) evidence and the evidence is not admissible to prove intent under this theory.

The State has also asserted the evidence is admissible to prove intent because the State is required to show the specific intent for torture murder, regardless of whether or not a defendant actively challenges intent; i.e. doing more than simply asserting their innocence of the charged acts. (Respondent's Brief, p.24.) Mr. Ehrlick certainly agrees that the State does have the burden to prove the specific intent for the crime charged. However, he maintains that the State is not able to sidestep the Idaho Rules of Evidence by charging a specific intent crime. *Stuart* did not hold that I.R.E. 404(b) evidence offered to show the requisite tortuous intent is always relevant to show a sadistic nature in a torture murder case, but that such evidence was admissible when the defendant specifically challenged his intent when committing the charged acts. *Stuart*, 110 Idaho at 170-171. I.R.E. 404(b) evidence does not have a different admissibility standard in a torture murder case than it would have for other crimes, and no such exception exists in the rule. I.R.E. 404(b). Allowing for the admission of prior bad act evidence in the case at hand would have the effect of making a special 404(b) admissibility rule for first degree torture murder cases. This new "special rule" amounts to the same kind of disparate treatment that this Court condemned in *State v. Grist*, 147 Idaho 49, 52 (2009) (holding there is no general exception to I.R.E. 404(b) for distinct types of crimes: I.R.E. 404(b) applies in the same way for cases involving sexual crimes as it does for all other crimes). Mr. Ehrlick fully addressed this issue in his Appellant's Brief and refers this Court to pages 43-45 for additional support of his assertion. The State has failed to supply any legal authority supporting a contrary reading of

I.R.E. 404(b) or the relevant and relied upon case law. As such, the State failed to prove that the prior acts of violence evidence is admissible under either of its intent exception theories.

C. The State Failed To Assert, Much Less Demonstrate, That The Error In Admitting The I.R.E. 404(b) Evidence Was Harmless Beyond A Reasonable Doubt

The State has asserted that because the jury was provided with an instruction limiting the purposes for which the I.R.E. 404(b) evidence was admitted, "there is no reason to believe that the jury did not follow the instructions under the facts of this case." (Respondent's Brief, pp.26-27.) The State continues that because Mr. Ehrlick did not prove the jury disregarded the instructions that "the error must be deemed harmless." (Respondent's Brief, pp.26-27.) This argument is entirely misplaced and does not accurately reflect the standards for harmless error.

The State's argument is dependent on their being no error to find harmless, that it was not error for the jury to have heard the I.R.E. 404(b) evidence regardless of a limiting instruction clarifying the purpose for which the jury could consider the evidence. (Respondent's Brief, pp.26-27.) In order to show an error was harmless, there must be a starting point, for the sake of argument, that there was an error. A jury instruction limiting the way a jury considers the evidence cannot cure the error of allowing them to hear the improper evidence unless the instruction is to completely disregard the evidence in its entirety. No such instruction was given to the jury in this case. The State's argument appears to be a concession that this evidence was limitedly and properly considered by the jury in rendering its verdict. The State has failed to show "beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Perry*, 150 Idaho 209, 227 (2010); *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). Therefore, because the State has conceded that the jury considered the information and made no attempt to prove that the information did not contribute to the verdict, the State has failed to meet

its burden to show the error is harmless and this Court must vacate Mr. Ehrlick's convictions.

IV.

The District Court Abused Its Discretion When It Granted The State's Second Motion In Limine Regarding The Presentation Of Evidence Of Mr. Ehrlick's Alleged Attempt To Alter And/Or Influence Testimony Of Ms. Jenkins

A. Introduction

Mr. Ehrlick asserts that evidence of his attempts to communicate with Ms. Jenkins did not prove that he was attempting to alter or influence Mr. Jenkins' testimony and, as a result, was not relevant evidence. (*See* Appellant's Brief, pp.50-54.) In response, the State asserts that the evidence could demonstrate either that Mr. Ehrlick was innocent or that he was attempting to alter Ms. Jenkins' testimony and that such evidence is relevant because it could potentially infer guilt. (Respondent's Brief, pp.27-32.) Reply is necessary to address this assertion, the State's failure to argue about the prejudicial effect of such evidence under I.R.E. 403, and the State's failure to meet its burden of proof in regards to harmless error.

B. The Evidence Was Not Admissible As It Was Not Relevant

In the Respondent's Brief, the State has conceded that the evidence regarding Mr. Ehrlick's alleged attempt to alter or influence Ms. Jenkins' testimony has an interpretation other than the State's theory: either the prevention of the admission of "incriminating truthful evidence" or "to prevent Jenkins from providing false testimony tending to incriminate him." (Respondent's Brief, p.30.) The State then asserts that the evidence is relevant as a matter of law because it "*could* be interpreted (having **any** tendency)" to show the State's theory of the evidence. (Respondent's Brief, p.30 (emphasis original).) It appears from the State's emphasized language that it acknowledges that this is not a case were the relevance of the disputed evidence is overtly clear, but an instance were one must at a minimum read much more

into Mr. Ehrlick's statements to find an interpretation that "could" show "any" tendency to support the State's interpretation. Mr. Ehrlick's arguments supporting a plain reading of his statements and the hurdles the State must leap in order to arrive at their interpretation were fully addressed in the Appellant's Brief and are incorporated herein by reference. (*See* Appellant's Brief, pp.50-54.)

While Mr. Ehrlick acknowledges that the State has correctly defined I.R.E. 401, he asserts that the State's interpretation infringes upon the purpose of the rule by stretching the limits of what constitutes, or in this case "could" constitute, relevant evidence, and fails to address Mr. Ehrlick's arguments that his interpretation of relevant case law supports a finding that the evidence was inadmissible. As such, Mr. Ehrlick maintains that through application of both I.R.E. and applicable case law, this court should find that the evidence was not relevant and not admissible.

Furthermore, assuming *arguendo* that the evidence is relevant under I.R.E. 401, the State's argument disregards I.R.E. 402 which states that "[a]ll relevant evidence is admissible except as otherwise provided by these rules . . ." I.R.E. 402. Specifically, because the evidence has, as conceded by the State, more than one potential interpretation there is danger of jury confusion and unfair prejudice under I.R.E. 403.

C. The Probative Value Is Outweighed By The Danger Of Unfair Prejudice

The State has asserted that "[t]he danger of unfair prejudice within the scope of I.R.E. 404(b) is the tendency of the evidence to 'prove the character of a person in order to show that the person acted in conformity therewith.'" (Respondent's Brief, p.31 (quoting from I.R.E. 404(b)).) The State has supplied no authority for its assertion regarding the limits of a prejudice analysis under I.R.E. 404(b) and, as such, this argument is not properly presented on appeal.

State v. Zichko, 129 Idaho 259, 263 (1996). The State has misconstrued I.R.E. 404(b). I.R.E. 404(b) specifically states that evidence is not admissible for purposes of proving the character of a person in order to show that the person acted in conformity therewith. I.R.E. 404(b). As such, if evidence is offered for another proper purpose, a defendant would never be able to address "unfair prejudice within the scope of I.R.E. 404(b)" under the State's theory.

The correct analysis for determining the admissibility of I.R.E. 404(b) evidence is a two-step analysis: (1) whether, under I.R.E. 404(b), the evidence is relevant as a matter of law to an issue other than the defendant's character or criminal propensity; and (2) whether, under I.R.E. 403, the district court abused its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Johnson,* 148 Idaho 664, 667 (2010). Therefore, it is I.R.E. 403 that controls the balancing of probative value verses unfair prejudice.

The State has failed to address prejudice under I.R.E. 403 as argued by Mr. Ehrlick.[7] As such, Mr. Ehrlick requests that this Court only consider his uncontested arguments regarding prejudice as presented in the Appellant's Brief.

D. The State Failed To Assert, Much Less Demonstrate, That The Error In Admitting The Evidence Related To Mr. Ehrlick's So Called Attempt To Alter Or Influence Ms. Jenkins' Testimony Was Harmless Beyond A Reasonable Doubt

The State has attempted a cursory argument regarding harmless error in a footnote. (Respondent's Brief, p.32, n.4.) However, the State has only argued the evidence presented

[7] The State has argued that "Ehrlick identified no act in conformity with character that the disputed evidence tends to prove" and that "[t]o the extent that evidence Ehrlick has an 'unlikeable' 'personality and style' can be characterized as proving Ehrlick's character 'in order to show that the person acted in conformity therewith,' Ehrlick has failed to show an abuse of discretion." (Respondent's Brief, p.31.) Although it is difficult to discern the State's exact argument regarding the improper prejudice standard, to the extent that the State is arguing that this evidence is character evidence, as opposed to permissible evidence regarding consciousness of guilt, Mr. Ehrlick asserts that this Court should find the evidence was improperly admitted pursuant to I.R.E. 404(b).

regarding Mr. Ehrlick's alleged attempts to alter or influence Ms. Jenkins' testimony "did not unfairly influence the jury's verdict." (Respondent's Brief, p.32, n.4.) The correct standard for harmless error is: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that **there was no reasonable possibility that such evidence complained of contributed to the conviction.**" *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967) (emphasis added)). As such, the State must meet the higher burden of showing the evidence could not have contributed to the conviction, not that it was considered, but did not unfairly influence the jury's verdict. Therefore, the State has failed to meet its burden to show the error is harmless. *See State v. Perry*, 150 Idaho 209, 227 (2010).

V.

The District Court Erred In Granting The State's Motion In Limine Regarding The Presentation Of Evidence Of Mr. Ehrlick's Emergency Room Visit On July 31, 2009

A. Introduction

Mr. Ehrlick maintains that there is no evidence to support that he attempted suicide or feigned a suicide attempt, rendering this evidence irrelevant and inadmissible. (*See* Appellant's Brief, pp.56-63.) The State asserts that there are conflicting interpretations of the evidence related to an alleged suicide attempt or feigned suicide attempt and as such, the evidence is relevant. (Respondent's Brief, pp.34-36.) The State's argument is without merit, and the State has once again failed to prove the error was harmless beyond a reasonable doubt.

B. The Evidence Related To Mr. Ehrlick's Emergency Room Visit Was Erroneously Admitted

The State has asserted that "[Mr.] Ehrlick's argument amounts to no more than a claim there are conflicting interpretations of the evidence." (Respondent's Brief, pp.35-36.) However, Mr. Ehrlick has asserted that there is no evidence that he attempted suicide as found by the

district court.[8] The State has failed to present any evidence that Mr. Ehrlick took or attempted to take a lethal dose of Lorazepam pills. (Respondent's Brief, p.34.) Instead the evidence, including testimony provided medical professionals presented at trial, show there was no suicide attempt. (S.R., p.417, 676-678; Tr., p.468, Ls.17-24, p.5472, L.21 – p.5474, L.3.) Additionally, the State explicitly took the position that there was no suicide attempt in its arguments to the district court. (S.R., p.417.) As such, the State is now arguing an inconsistent position by attempting to assert for the first time on appeal that Mr. Ehrlick actually attempted suicide.

The State has also asserted that "the evidence supports the inference that [Mr.] Ehrlick had . . . feigned attempt to take his life . . ." (Respondent's Brief, p.35.) Mr. Ehrlick again maintains that there are not conflicting interpretations of this evidence, that there is no evidence of a fake suicide attempt, and that it is ludicrous to believe that an individual was actively faking a suicide attempt while at the same time repeatedly stating to all who asked that he was not attempting suicide. (S.R., pp.676-678.)

Due to there being no evidence that supports a finding of an actual or feigned suicide attempt, Mr. Ehrlick asserts that the State's arguments regarding "conflicting interpretations of the evidence" are not applicable. The State's theory requires this Court to disregard what the actual evidence showed in order to surmise a false conflict in the interpretation of the evidence, and then to liberally apply I.R.E. 401 to uphold the improper finding that Mr. Ehrlick had attempted suicide.

Because the State's arguments concerning the prejudicial effect of this evidence and the violation of Mr. Ehrlick's Fifth Amendment rights were not remarkable, no further reply is

[8] It is important to note that he district court found only that there was evidence of an actual suicide attempt and its considerations for allowing the presentation of the testimony were based solely on this finding.

necessary. Accordingly, Mr. Ehrlick simply refers the Court back to pages 63-66 of his Appellant's Brief.

C. The State Failed To Assert, Much Less Demonstrate, That The Error In Admitting I.R.E. Evidence Of Mr. Ehrlick's Emergency Room Visit Was Harmless Beyond A Reasonable Doubt

In another footnote (Respondent's Brief, p.38, fn.6), the State again applies a non-existent harmless error standard. The State made no argument that the evidence could not have contributed to the conviction (*See State v. Perry*, 150 Idaho 209, 227 (2010)), but merely stated that the jury could not have concluded that the evidence showed a substance abuse problem or an invocation to the right to silence indicating guilt. (Respondent's Brief, p.38, n.6.) As such, the State failed to meet its burden to prove the error was harmless and this Court must vacate Mr. Ehrlick's convictions.

VI.

The District Court Abused Its Discretion By Allowing Samantha Burnett To Testify That Others Told Her That They Had Not Heard Of A Birthday Party And That, In Her Lay Opinion, The Story Of R.M. Going To A Birthday Party Did Not Make Sense To Her

A. Introduction

Mr. Ehrlick asserts that the district court abused its discretion by allowing Samantha Burnett to testify that others had told her of a birthday party, and further erred in allowing her to testify that, based in part on upon this information, the story of R.M. going to a birthday party did not make sense to her. His arguments in support of this claim are found in the Appellant's Brief, and need not be repeated herein in detail but are incorporated by reference. (*See*

Appellant's Brief, pp.67-72.) This Reply is necessary to address the State's factually erroneous claims and meritless legal arguments.[9]

B. Mr. Ehrlick Did Not Claim There Was A Birthday Party, Only That R.M. Asked To Attend One

The State asserts that Mr. Ehrlick "originally claimed that R.M. had gone to a birthday party that he failed to return from." (Respondent's Brief, p.38 (citing Tr., p.3156, L.16 – p.3162, L.10; p.3331, L.10 – p.3343, L.22).) This is false. Mr. Ehrlick consistently claimed that R.M. asked him if he could attend a birthday party, that he told R.M. he could not, that R.M. went back outside to play, and that Mr. Ehrlick went to look for R.M. and the birthday party R.M. asked him to attend when R.M. did not come home; however, Mr. Ehrlick never claimed that there was an actual birthday party. (*See generally*, Ex., pp.68-69 (transcript of Mr. Ehrlick's call to 911); Ex., pp.73-110 (Officer Schloegel's audio recorded July 24, 2009 at the complex); Ex., pp.131-168 (Mr. Ehrlick's interview with detectives on July 25, 2009); Ex., pp.170-224 (Mr. Ehrlick and Ms. Jenkins' interview with law enforcement on July 26, 2009); Ex. pp.238-467 (Mr. Ehrlick's interviews with law enforcement on July 30, 2009); Ex., pp.474-529 (Mr. Ehrlick's interview with law enforcement on August 9, 2009); Tr., p.5882, L.22 – p.6145, L.1 (Mr. Ehrlick's testimony).) In its Respondent's Brief, the State falsely claims that Mr. "Ehrlick originally claimed that R.M. had gone to a birthday party that he failed to return from." (Respondent's Brief, p.38 (citing Tr., p.3156, L.16 – p.3162, L.10; p.3331, L.10 – p.3343, L.22.) A review of the transcripts cited to by the State in support of its claim demonstrates that the State's factual assertion is erroneous.

[9] The State's claim that Ms. Burnett's testimony was not hearsay (Respondent's Brief, pp.39-40) is unremarkable, and Mr. Ehrlick relies upon the arguments previous made as to why her testimony was impermissibly admitted (Appellant's Brief, pp.67-68.)

The first section cited to by the State (Tr., p.3156, L.16 – p.3162, L.10), is a portion of the testimony provided by Chris Phillips, the complex security guard. *Id.* Mr. Phillips testified that he saw Mr. Ehrlick walking around the complex, calling for R.M., and asking kids and teenagers if they had heard about a birthday party and, if so, where it was. (Tr., p.3156, L.16 – p.3158, L.14.) Some of the teenagers responded by stating that they *had* heard of a birthday party but they were not sure where it was located. (Tr., p.3158, Ls.15-21.) Mr. Phillips testified that Mr. Ehrlick "said something about [R.M.] wanting to go to a birthday party, but we don't know where it's at," and that Mr. Ehrlick asked him if he had heard anything about a birthday party. (Tr., p.3158, L.22 – p.3161, L.14.) He further testified that Mr. Ehrlick told him that one of the kids said there was a possible birthday party in Building D but he was not sure. (Tr., p.3161, Ls.10-22.) At no point did Mr. Phillips testify that Mr. Ehrlick "claimed that R.M. had gone to a birthday party that he failed to return from." (*See* Respondent's Brief, p.38.)

The second section cited to by the State (Tr., p.3331, L.10 – p.3343, L.22), is the testimony of Katie Waggoner, the dispatcher who answered Mr. Ehrlick's 911 call. *Id.* Ms. Waggoner never testified that Mr. Ehrlick told her that R.M. went to a birthday party, although she did testify that this call stood out to her because it involved a "young kid being at a birthday party so late." (Tr., p.3334, Ls.10-16.) Regardless, what Ms. Waggoner thinks she remembered is irrelevant. In the 911 call, which was made after Mr. Ehrlick spoke with Mr. Phillips and after Mr. Phillips observed teenagers telling Mr. Ehrlick that they *had* heard of a birthday party, Mr. Ehrlick actually said, "Everybody keeps – his name is [R.M.]. Everybody keeps directing me to the – a birthday party. That's where everybody's saying that he's at but I can't find this birthday party or nothing." (Tr., p.3156, L.16 – p.3167, L.8; .Ex., p.69.) This is, of course, completely consistent with Mr. Phillips' testimony noted above and with Mr. Ehrlick's

repeated and consistent statement that R.M. asked him if he could attend a birthday party. Neither Mr. Phillips, nor Ms. Waggoner, nor any other witness testified that Mr. Ehrlick ever said that "R.M. **had** gone to a birthday party that he failed to return from." (Respondent's Brief, p.38 (emphasis added).) The State's factual assertion to the contrary is false.

C. The State Asserted That Ms. Burnett's Opinion Testimony Was Relevant To Mr. Ehrlick's Credibility And Was Based, In Part, On Impermissible Hearsay

Opinion testimony offered pursuant to I.R.E. 701 can be based only upon the perception of the witness, must be helpful to the determination of a fact in issue, and cannot be based upon scientific, technical or other specialized knowledge. I.R.E. 701. No witness may opine on whether or not another witness is credible. *State v. Almaraz*, 154 Idaho 584 (2013). The State offered that Ms. Burnett's testimony should be admitted in violation of both of these clear rules.

In response to defense counsel's objection that Ms. Burnett would be providing improper and irrelevant opinion evidence, the State asserted that pursuant to I.R.E. 701, Ms. Burnett should be allowed to provide her "impression of this birthday party story." (Tr., p.3500, L.13 – p.3503, L.25.) The prosecutor continued,

> My understanding of what she'll say is that there were questions about this story from the beginning based on the time the birthday party was supposed to start, **the fact that nobody else in this apartment complex had heard about this birthday party**, and so **I think it goes to the credibility of the story that Mr. Ehrlick was telling from day one**.

(Tr., p.3503, L.25 – p.3502, L.20 (emphasis added).) Ms. Burnett testified that she concluded that the birthday party story did not make sense to her because "It was 10 o'clock at night. There were no signs of a birthday party. **I know with so many kids in that neighborhood, and none of them knew anything about a birthday party**." (Tr., p.3506, Ls.5-14 (emphasis added).)

In its Respondent's Brief, the State does not claim that Ms. Burnett's opinion testimony was not based upon hearsay; rather, the State merely gives examples of lay witnesses being

allowed to testify, pursuant to I.R.E. 701, based upon their own perceptions. *See* Respondent's Brief, p.41 (citing *State v. Salazar*, 153 Idaho 24, 26 (Ct. App. 2012); *State v. Almaraz*, 154 Idaho at ___, 301 P.3d at 260; *Carillo v. Boise Tire Co.*, 152 Idaho 741, 750 fn.3 (2012). In *Salazar*, an officer was allowed to testify that the defendant was the person seen in a security video based upon the officer's familiarity with the defendant and upon the officer's own perception of what was contained in the video. *Salazar*, 153 Idaho at 25-27. In *Almaraz*, a detective was allowed to provide her lay opinion that a person she personally observed on a security video was in a "shooter's crouch," where "[t]he defense failed to show that identifying Almaraz's stance as a 'shooter's crouch' was due to specialized knowledge or was a term of art used by the police." *Almaraz*, 154 Idaho at ___, 301 P.3d at 260. In a footnote in *Carillo*, the Idaho Supreme Court rejected the defendant's claim that lay testimony is not competent to establish that a child has developmentally digressed because, "[s]o long as a lay witness does not testify on the basis of specialized knowledge, his opinions or inferences are admissible testimony if they are rationally based on his own perceptions and helpful to the trier of fact." *Carillo*, 152 Idaho 750, fn.3 (citing I.R.E. 701.) The State's citation to authority further confirms Mr. Ehrlick's assertion that lay witness testimony must be based upon the witness' own perceptions, and can't be based on impermissible hearsay.

Furthermore, the State asserts that Mr. Burnett's testimony was relevant "to prove that [Mr.] Ehrlick sent police and dozens of volunteers on a meaningless and futile search for R.M. *to hide the fact R.M. was already dead and [Mr.] Ehrlick knew this.*" (Respondent's Brief, p.42 (emphasis in original).) Although, as noted above, the State cites to nothing in the record (and, indeed, there is nothing there to cite) demonstrating that Mr. Ehrlick either claimed that R.M. had gone to a birthday party or that Mr. Ehrlick knew there was no party when he spoke with the

police, like the prosecutor during the trial proceedings (Tr., p.3503, L.25 – p.3502, L.20), the State has again acknowledged that Ms. Burnett's testimony was offered as a statement on Mr. Ehrlick's credibility. The only way that the jurors could conclude that Mr. Ehrlick was sending anyone on a "futile search" for R.M. and that he did so to hide the fact that he knew R.M. was already dead, was if they believed her testimony that R.M. going to a birthday party did not make sense to her. In turn, Mr. Burnett reached this conclusion, in part, because, "I know with so many kids in the neighborhood, and none of them knew anything about a birthday party." (Tr., p.3506, Ls.5-14.) The State's argument that Ms. Brunett's opinion testimony was admissible to show that Mr. Ehrlick sent police on a futile search, supports Mr. Ehrlick's argument that her opinion was offered to challenge Mr. Ehrlick's credibility, and was inadmissible.

D. The State Has Failed To Assert, Much Less Demonstrate, That The Error In Admitting Ms. Burnett's Opinion Testimony Did Not Contribute To The Verdict

The State's entire harmless error argument on this issue is as follows:

> Finally, even if the lay opinion evidence was improperly admitted any error was necessarily harmless given the overwhelming unchallenged evidence that those who searched for R.M. found no evidence to support [Mr.] Ehrlick's statement R.M. had gone to a birthday party. [Mr.] Ehrlick's argument that the absence of one person's opinion that [Mr.] Ehrlick's insistence that R.M. had gone to a birthday party made little sense under the circumstances "devastates the State's weak and circumstantial case" (Appellant's brief, p. 72) is, at best, hyperbolic.[10]

(Respondent's Brief, pp.42-43.) The State's harmless error argument appears to be based upon the same faulty understanding of the harmless error rule repeated throughout its brief; namely, the State fails to grasp that it must demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict (*See Almaraz*, 154 Idaho 584 ___, 301 P.3d 242, 256 (2013); *State v.*

[10] The hyperbole, as the State refers to it, is based upon the evidence showing there were discussions about a birthday party occurring in the evening of July 24, 2009, and the importance the State placed on disproving the

Perry, 150 Idaho 209, 221 (2010); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993); *Chapman v. California,* 386 U.S. 18, 24 (1967)), not that there was "overwhelming unchallenged evidence that those who searched for R.M. found no evidence to support [Mr.] Ehrlick's statement R.M. had gone to a birthday party"[11] (Respondent's Brief, pp.42-43). Because the State has failed to assert, much less prove beyond a reasonable doubt that the district court's ruling allowing Ms. Burnett to provide her opinion that Mr. Ehrlick's birthday party did not make sense to her, did not contribute to the verdict, this Court must vacate Mr. Ehrlick's convictions.

VII.

The District Court Abused Its Discretion When It Denied Mr. Ehrlick's Request To Question Detective Brechweld As To Whether K.D. Told Him That There Was Talk Of A Birthday Party On July 24th As The Statement Was Not Offered For The Truth Of The Matter Asserted; Rather, The Statement Was Offered To Rebut The State's Theory That Mr. Ehrlick And Ms. Jenkins Made Up The Birthday Party Story

A. Introduction

Mr. Ehrlick has asserted that the district court abused its discretion by denying his ability to question Detective Brechweld as to whether K.D. told him that there was talk of a birthday party occurring on Jury 24th, as the statement was not offered for the truth of the matter asserted but, rather, was offered to rebut the State's theory that Mr. Ehrlick and Ms. Jenkins were the only sources of a story involving a birthday party. (Appellant's Brief, pp.72-74.) In response, the State asserts that K.D.'s statements about other people talking about a birthday party were, in turn, out-of-court statements and, thus, the testimony would constitute inadmissible double hearsay. (Respondent's Brief, pp.43-46.) The State's argument is unremarkable except to say

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existence of a birthday party, as the existence of a birthday party supports Mr. Ehrlick's claim that he made from the very beginning, that R.M. asked if could attend a birthday party. (*See* Appellant's Brief, pp.17-21, 71-72.)

that, whether single or double hearsay, the proffered testimony was not offered for the truth of the matter asserted and, therefore, by definition was not hearsay. This Reply is necessary to address the State's harmless error argument which is, once again, based upon an erroneous factual assertion, and uses the wrong legal standard.

B. The State Has Failed To Assert, Much Less Demonstrate, That The Error In Denying Mr. Ehrlick The Ability To Question Detective Brechwald About Getting Information From K.D. About A Birthday Party Did Not Contribute To The Verdict

The State again premises its harmless error argument on a claim that Mr. Ehrlick initially claimed that R.M. had gone to a birthday party. (Respondent's Brief, p.46.) Again, the State cites to no evidence (nor could it since none exists), that Mr. Ehrlick had said that R.M. had gone to a birthday party. (Respondent's Brief, pp.46-47.) As noted above, Mr. Ehrlick repeatedly said that R.M. had asked him if he could go to a birthday party, Mr. Ehrlick told him that he could not, and that after R.M. did not return to the apartment, Mr. Ehrlick began looking for him and looking for a birthday party. (*See generally*, Ex., pp.68-69 (transcript of Mr. Ehrlick's call to 911); Ex., pp.73-110 (Officer Schloegel's audio recorded July 24, 2009 at the complex); Ex., pp.131-168 (Mr. Ehrlick's interview with detectives on July 25, 2009); Ex., pp.170-224 (Mr. Ehrlick and Ms. Jenkins' interview with law enforcement on July 26, 2009); Ex. pp.238-467 (Mr. Ehrlick's interviews with law enforcement on July 30, 2009); Ex., pp.474-529 (Mr. Ehrlick's interview with law enforcement on August 9, 2009); Tr., p.5882, L.22 – p.6145, L.1 (Mr. Ehrlick's testimony).)

Furthermore, the State again fails to assert, much less prove beyond a reasonable doubt, that the district court's ruling depriving Mr. Ehrlick the ability to present Detective Brechwald's testimony did not contribute to the verdict. The State's case was based in large part on the

[11] As noted above, the State has failed to demonstrate, and there is no evidence to support a claim, that Mr. Ehrlick actually said that "R.M. had gone to a birthday party."

notion that, "[t]he reality is nobody had heard about a birthday party story. Nobody knew about a birthday party. He's lying when he says lots of people did." (Tr., p.6261, Ls.9-15.) The State has failed to assert or demonstrate that district court depriving the jury of evidence that the police had, in fact, heard a "birthday party story" from someone other than Mr. Ehrlick, did not contribute to the verdict.

VIII.

The District Court Erred In Allowing The State To Question Mr. Ehrlick Regarding A Custody Agreement For R.A. And In Allowing The Custody Agreement To Be Admitted As An Exhibit, Although It Was Later Withdrawn By The District Court As Improperly Admitted

A. Introduction

Mr. Ehrlick has asserted that it was error for the district court to allow for the admission of a custody order and related testimony involving Ms. Jenkins' daughter, R.A. because it was not relevant to any issue of consequence in this case. The State has asserted this information is relevant for the jury to make a credibility determination. Reply is necessary to address this argument, to address the prejudicial effect of this evidence, and to address the State's failure to meet its burden to prove the error harmless beyond a reasonable doubt.

B. The Custody Agreement And Related Testimony Were Irrelevant And Inadmissible

The State has asserted that "[t]he existence of a custody order prohibiting leaving R.A. alone with [Mr.] Ehrlick impeached the testimony that he was R.A.'s primary caregiver and the inference that he provided good care for R.A." (Respondent's Brief, p.50.) While Mr. Ehrlick concedes that evidence that impeaches a witness may be relevant to credibility determinations, he maintains that this evidence was not properly admitted impeachment evidence because it did not have the actual effect of impeaching Mr. Ehrlick. Simply, the custody agreement proves only that R.A. was legally not to be left alone in the care of Mr. Ehrlick. (Tr., p. 6051, Ls.1-22.)

Contrary to the State's assertion, the mere existence of the order does not have a tendency to prove that Mr. Ehrlick was not providing appropriate care for R.A. in the summer of 2008. This is similar to saying that a no contact order between a domestic violence victim and the abuser has some tendency to show that the abuser did not contact the victim after issuance of an order, regardless of whether or not the abuser had been informed of the order. While the existence of the no contact order may criminalize otherwise legal behavior, it does not prove that either party acted in conformity with the order; nor does it have some tendency to show that the order was complied with. Without some proof of knowledge of the order or evidence that Mr. Ehrlick had not been an appropriate care provider for R.A. in the summer of 2008, the mere existence of the order has no tendency to prove that Mr. Ehrlick was providing false or unreliable testimony.

The State has asserted that Mr. Ehrlick must have known about the order because he was in a domestic relationship with Mr. Jenkins and because the couple had used a babysitter. (Respondent's Brief, p.50.) However, neither of these facts demonstrate that Mr. Ehrlick was informed of the order. It is merely speculation on the part of State that the use of a babysitter signified that Ms. Jenkins informed Mr. Ehrlick of the custody order, and that Mr. Ehrlick was attempting to not be alone providing appropriate care for R.A.

Additionally, the State asserts that Mr. Ehrlick not being aware of the custody order, somehow has a tendency to prove that he was not providing appropriate care for R.A. (Respondent's Brief, p.51.) The State fails to show how Mr. Ehrlick not being aware of a legal document issued in a proceeding he was not involved with, has any tendency to prove that he was not providing appropriate care for R.A. in 2008 and, as such, the State has failed to show how this lack of knowledge impeaches his testimony. Because the State has failed to show how

the custody order actually provided impeachment of Mr. Ehrlick's testimony that he provided appropriate care for R.A. in the summer of 2008, it is not relevant for the limited purpose of impeaching Mr. Ehrlick.

C. The Probative Value Is Outweighed By The Prejudicial Effect

The State has also asserted that there was no unfair prejudice to Mr. Ehrlick because it would be "irrational" for the jury to reach the conclusion that R.A. would be in danger if left alone with Mr. Ehrlick. (Respondent's Brief, p.53.) However, this was the conclusion the State attempted to insure the jury reached by asking the question: "Isn't it true that in January of 2008, Rusty Ames, [R.A.]'s father, filed a petition with the court saying that [R.A.] was in an unsafe and unsatisfactory environment while Melissa was living with you?" (Tr., p.6039, Ls.7-11.) The State then discussed the order which limited Mr. Ehrlick's ability to be alone with R.A., implying that such order had been issued because of an unsafe and unsatisfactory environment. (Tr., p.6051, Ls.1-22.) While "unsatisfactory" may not imply a threat of danger, certainly "unsafe" does. As such, Mr. Ehrlick asserts that it is neither irrational nor unwarranted for the jury to reach the conclusion that R.A. was in danger based upon the questioning related to the agreement. In a case dealing with the death of a child that had been in the care of Mr. Ehrlick, this evidence is highly prejudicial, and to the extent it has any probative value at all, it is outweighed by the prejudicial effect.

D. The State Failed To Assert, Much Less Demonstrate, That The Error In Admitting Evidence Of The R.A. Custody Order Was Harmless Beyond A Reasonable Doubt

Finally, the State failed to sufficiently meet its burden of proving the error harmless. *See State v. Perry*, 150 Idaho 209, 227 (2010). The State has failed to prove beyond a reasonable doubt that there was no reasonable possibility that the erroneously admitted evidence contributed to the conviction. Instead, the State argued only that it was not plausible that the jury could

conclude that Mr. Ehrlick was a risk to R.A. and therefore killed R.M. (Respondent's Brief, p.53.) The State totally failed to address the possibility of the contested evidence contributing to the convictions. As such, the State has again failed to meet its burden and Mr. Ehrlick's convictions must be vacated.

IX.

The State Violated Mr. Ehrlick's Right To A Fair Trial By Committing Prosecutorial Misconduct

A. Misconduct For Which There Was An Objection: The Prosecution Committed Misconduct By Encroaching Upon The Jury's Function To Make Credibility Determinations When It Repeatedly Referred To Mr. Ehrlick As A Liar

The State's argued that the prosecutor did not commit misconduct by calling Mr. Ehrlick a liar because the arguments were "strictly confined" to "commentary about the statements themselves." (Respondent's Brief, pp.58-59.) These arguments are not remarkable and will not be addressed in this Reply Brief. Mr. Ehrlick maintains, as discussed thoroughly in the Appellant's Brief, that the language used by the State and its meaning is clear from the record and that such argument is not merely permissible comment on the evidence, but rises to the level of expressing personal opinion and blatantly describing Mr. Ehrlick as a liar.

Because this error was preserved for appellate review, the State has the burden of "demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 227 (2010). The State has once again failed to assert, present any argument in support of, and prove beyond a reasonable doubt, that such error did not contribute to the conviction. As such, the State has again failed to meet its burden and, if error is found, this Court must vacate Mr. Ehrlick's convictions.

B. Misconduct For Which There Was No Objection: The Prosecution Committed Misconduct By Arguing That Certain Actions By Mr. Ehrlick Toward R.M. Constituted Torture, Mischaracterizing Evidence, And Arguing Evidence For An Improper Purpose

1. The Prosecution Committed Misconduct By Arguing That Certain Actions By Mr. Ehrlick Toward R.M. Constituted Torture Although The Evidence Did Not Comport With The Statutory Definition Of Torture

The State has asserted that the prosecutor's reliance on Dr. Keller's testimony regarding actions that amounted to his definition of torture in closing argument is not error because a prosecutor can rely upon admitted testimony in presenting closing argument. (Respondent's Brief, pp.64-65.) The State continues that because Mr. Ehrlick did not support this argument with legal authority, the issue is not properly presented on appeal. *Id.* The State is correct that Mr. Ehrlick did not present authority on that issue. However, such argument is not persuasive because that is not the issue Mr. Ehrlick has raised on appeal. The prosecutorial misconduct raised on appeal is not the reliance on the expert's testimony, but the prosecutor's disregard for, and pervasive attempts to circumvent, Idaho's legal definition of "torture," and the prosecutor's characterization of acts which do not meet that legal definition as provided to the jury. (R., p.1216.) Mr. Ehrlick did present both authority and argument in support of his position. (Appellant's Brief, pp.82-87.)

In the case at hand, the jury was instructed, consistently with the Idaho Code, that torture is "the intentional infliction of extreme and prolonged pain with the intent to cause suffering and or the infliction of extreme and prolonged acts of brutality." (R., p.1216.) Dr. Keller specifically recognized that his definition of torture was different than the definition supplied by the Idaho Code. (Tr., p.5093, L.14 – p.5096, L.12.) The prosecutor had a duty to argue that only actions that amounted to torture under Idaho law were "torture," not to attempt to deceive the jury or dupe them into believing that such actions were legally "torture" in Idaho because Dr. Keller had labeled such actions as torture. (*See State v. Irwin,* 9 Idaho 35, ___, 71 P. 608, 610 (1903) (noting that the prosecutor must refrain from deceiving the jury by use of inappropriate

inferences).

The State has argued that conduct which did not amount to the legal definition of torture was still properly argued by the prosecution to show intent under I.C. § 18-4001. (Respondent's Brief, p.65.) However, it is clear that such arguments were presented to convince the jury that Mr. Ehrlick's actions amounted to torture, not to prove his intent in later completing alleged acts that amount to torture under Idaho law. Mr. Ehrlick cited extensively to the State's improper closing argument Appellant's Brief, and those citations are not repeated herein but are incorporated by reference. (*See* Appellant's Brief, pp.84-85.) These citations show that the prosecutor, repeated, directly and erroneously discussed what actions constitute "torture," not mere "intent," and the State's appellate argument is without merit.

a. The Prosecutorial Misconduct Requires Vacation Of The Conviction

The State has argued that the jury was instructed on what the legal definition of torture was and that because we presume that the jury follows jury instructions, Mr. Ehrlick has failed to show prejudice. (Respondent's Brief, p.66.) However, the State has also noted that Dr. Keller's testimony was admissible because it assisted the trier of fact in understanding a subject that is "beyond the common sense, experience and education of the average juror." (Respondent's Brief, p.65 (citing to *State v. Joslin*, 145 Idaho 75, 81 (2007); I.R.E. 702; *State v. Arrasmith*, 132 Idaho 33, 42 (Ct. App. 1998).) The State clearly believed that the average juror would not be able to understand torture without an expert's testimony. Therefore, it logically follows that there is a danger that the jury, although properly instructed on torture, may not understand the instruction without assistance. In the case at hand, the jury received ample assistance in understanding what constituted "torture" from the prosecution. Unfortunately, that assistance led to an incorrect interpretation of an element the jury was asked to find. The prosecution's assertions that Mr. Ehrlick's activities were "torture" encouraged the jury to reach a guilty

verdict based on emotions attached to the concept of torture and an improper theory, rather than the facts of the case and their proper application to the law. As such, it cannot be shown beyond a reasonable doubt that the error did not contribute to Mr. Ehrlick's conviction.[12]

2. The Prosecution Committed Misconduct By Misstating The Evidence Presented At Trial

The State has asserted that there was no prosecutorial misconduct in arguing that "Mr. Ehrlick's admissions supported the inference that he caused the fatal injuries" to R.M. (Respondent's Brief, p.67-68.) This argument is specious and mischaracterizes the actions of the prosecutor. Although the State repeatedly asserts in its Respondent's Brief that the prosecutor had "specifically" only argued that Mr. Ehrlick's admissions merely supported the "inference" that he caused R.M.'s fatal injuries (*id.*), the prosecutor specifically articulated that Mr. Ehrlick had admitted to causing the fatal injuries. (Tr., p.6224, Ls.20-21 (Mr. Ehrlick "admitted to doing things, doing the very things that would cause the injuries that [R.M.] died from."), p.6244, L.24 – p.6245, L.2. ("He's admitting to doing things that would cause [R.M]'s fatal injuries, specifically dropping the knees, something that you've heard about a lot."), p.6251, Ls.5-6 ("He admitted that the fatal blows took place in the apartment."), p.6295, Ls.13-15 ("He told us that he did those things or did things that would cause the injuries that [R.M.] suffered.").) Mr. Ehrlick never made such admissions. (Tr., p.5582, L.22 – p.6145, L.1, p.6010, L.12 – p.6011, L.1, p.6103, L.13 - p.6106, L.8; St. Ex. 12-4A – 12-10A, 12-12A – 12-14A, 12-16A, 12-20A - 12-22A (Audio Recording of Mr. Ehrlick's Interviews with police).) Despite the State's attempt to

[12] The Appellant's Brief was organized in such a way that the harm for each alleged, unpreserved, prosecutorial misconduct error was only briefly touched upon in the section related to the alleged error and this was followed by the fundamental error review including an articulation of harm for each error in later sections. To the extent this organizational style could be read as an assertion that the harm for the unpreserved error can be accumulated to create a fundamental error, Mr. Ehrlick clarifies that was not his intention and he is not asserting such a cumulative error argument. However, he maintains that if this Court finds that any of the asserted, unpreserved, prosecutorial misconduct is found to be fundamental error that these errors and the preserved prosecutorial misconduct can then

characterize the prosecutor's comments as mere inferences, the statements are clear and constitute a misstatement of the actual evidence presented at trial. As such, these misrepresentations of the evidence amount to prosecutorial misconduct.

3. The Prosecution Committed Misconduct By Arguing Evidence For An Improper Purpose

In support of its claim that Mr. Ehrlick misrepresents the record to support his argument that there was no evidence presented that R.M. was limping on July 24, 2009, the State relies upon evidence presented at trial showing that R.M. had been limping at some point. (Respondent's Brief, pp.69-71.) The State fails, however, to comprehend that the issue was not whether there was evidence that R.M. had a limp at some point in the past; rather, the issue was whether R.M. was limping on July 24, 2009. Mr. Ehrlick never claimed, nor has he in this appeal, that there was no evidence to support a conclusion that R.M. had been limping. He does assert, however, that there was no evidence presented that R.M. was limping on July 24, 2009, and, therefore, it was improper for the prosecutor to argue to the jury that R.M. was limping that day.

The State premises its claim first upon following exchange occurring between Detective Quilter and Mr. Ehrlick:

> Det. Quilter: Okay? The timeline that we've been provided is not – it's not working out. Okay? Because the timeline, it just isn't working. It isn't working at all. [Ms. Jenkins] described that **it was unlikely that he was outside very much when she was away from work because he got hit in the ankle one time and he'd been hobbling around on one leg because his ankle was hurt.**
>
> Mr. Ehrlick: **No, his ankle was fine.**
>
> Det. Quilter: So is she making that up?
>
> Mr. Ehrlick: Yeah.

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be reviewed for cumulative error for the purposes of determining if the prosecutor was engaging in a pattern of misbehavior. *State v. Ellington*, 151 Idaho 53, 70-71 (2011).

Det. Quilter: Well, that seems like a pretty big thing to make up.

Mr. Ehrlick: Yeah.

Det. Quilter: Why would she make that up?

Mr. Ehrlick: **He had an accident on his ankle, her, and he was hobbling on it for a while but –**

Det. Quilter: Okay, So he was hobbling on his ankle.

Mr. Ehrlick: **Yeah, for a while.**

Det. Quilter: What was the accident?

Mr. Ehrlick: What's that?

Det. Quilter: The accident, what was that? **Because she recalls a specific strike to his leg with a stick.**

Mr. Ehrlick: **No, no. That was not it at all.**

(Ex. pp.417-418 (emphasis added).) Detective Quilter told Mr. Ehrlick that he was trying to get an accurate "timeline" together and that Ms. Jenkins told him that R.M. was limping - Mr. Ehrlick specifically denied this. *Id.* Mr. Ehrlick only acknowledge R.M. had hobbled on his ankle "for a while," and some undetermined time, and that it was not a result of being struck by a stick.

The State further asserts that Mr. Ehrlick's father testified that R.M. had a "'hard limp'" starting in the beginning of summer. (Respondent's Brief, p.71 (citing Tr., p.4641, Ls.9-24).) The State fails to acknowledge however, that Mr. Ehrlick Sr. was asked specifically, "Do you recall, was that closer to the beginning of summer or closer to the time that [R.M.] was reported missing," to which he responded, "The very beginning of summer." (Tr., p.4641, Ls.12-15.) Thus, rather than supporting the State's assertion, Mr. Ehrlick Sr.'s testimony actually supports

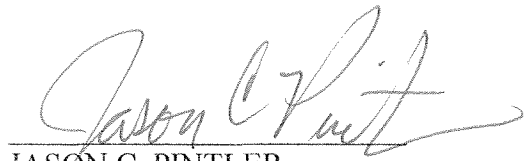
Mr. Ehrlick's claim that R.M. was limping at the beginning of the summer, and not on July 24, 2009, when he went missing, and there was no evidence presented to the contrary.

The State correctly notes that Mr. Ehrlick did not challenge two of the prosecutor's statements made during closing argument. (Respondent's Brief, pp.69-70 (citing Tr., p.6324, Ls.2-11; p.6421, L.16 – p.6423, L.25.) Mr. Ehrlick did not challenge these statements as being improperly based upon evidence not presented to the jury, because they were not based upon evidence improperly presented to the jury. In the first statement, the prosecutor argued evidence supporting their theory that R.M. was tortured, and did not refer to the ankle injury as being present on July 24, 2009. (Tr., p.6323, L.22 – 6331, L.4.) In the second statement, the prosecutor argued that Mr. Ehrlick was not being cooperative and failed to tell investigators that R.M. was limping, which is something that people at the pool would have noticed. (Tr., p.6421, L.16 – p.6423, L.25.) This argument actually supports Mr. Ehrlick's claim that he never said that R.M. was limping on July 24, 2009, and that the only evidence that he was limping that day came in through Detective Quilter's statement to Mr. Ehrlick that Ms. Jenkins said he was limping – evidence that could not be considered for the truth of the matter asserted. (Tr., p.1650, L.22 – p.1651, L.4; Tr., pp.11-23.) The State's argument is without merit.

CONCLUSION

Mr. Ehrlick respectfully requests that his judgments of conviction be vacated and his case remanded for further proceedings.

DATED this 3rd day of December, 2013.



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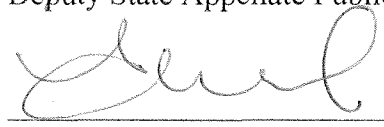

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of December, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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